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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 300

REV. L. A. CLARK, ET AL., *Petitioners,*

vs.

ALLEN C. THOMPSON, MAYOR, ET AL., *Respondents.*

REPLY TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO PETITION FOR WRIT OF CERTIORARI

In response to the request of the Court that Respondents reply to the Petition for Writ of Certiorari, we submit the following brief. In so doing, we will consider and discuss particularly the case of *Frasier* v. *Board of Trustees*, 134 F.Supp. 589, affirmed 350 U.S. 979, 100 L.Ed. 848, as requested by the Court, and will point out to the Court that said case has no application to a decision of this litigation and in that case, unlike here, there was a proper class action and proper ground for injunctive relief.

Decisions Below

This action was brought in the District Court for the Southern District of Mississippi by three plaintiffs: Reverend L.A. Clark, Mary A. Cox and W.R. Wren, against the Mayor and Commissioners, Chief of Police, Director of Parks and Chairman of the City Library Board of the

City of Jackson, Mississippi. The complaint alleged that the three plaintiffs were being deprived of constitutional rights to the use without discrimination on the ground of race of public recreation facilities and public library facilities in the City of Jackson and that these officials by the enforcement of three alleged unconstitutional statutes of the State of Mississippi had deprived plaintiffs and members of their class of the rights of undiscriminatory use of such public recreation facilities and public library facilities.

Plaintiffs sought declaratory relief and injunctive relief for and on behalf of themselves and "on behalf of thousands of Negroes in Jackson and all other parts of Mississippi who are similarly situated because of race and color."

A three-judge court was convened and then dissolved on the ground that if the State statutes were construed to deny use of public recreational facilities on an integrated and equal basis, the statutes would be plainly unconstitutional and would not require a three-judge court; but that plaintiffs' counsel had admitted they were actually attacking a pattern of racial discrimination rather than the constitutionality of statutes, and that for this reason also a three-judge court was unnecessary. See Opinion 204 F.Supp. 30.

The decision of the single District Judge is found 206 F.Supp. 539. The decision of the District Judge was that in view of the facts ("None of the plaintiffs has been arrested or threatened with arrest under any statute or alleged discriminatory practice attacked in this case. The plaintiffs have not been denied any right, privilege or immunity claimed by them by any of the defendants . . . there is no evidence that they have been denied the right to use any public recreational facility in that city."), that this was not a proper class action and that no relief could

be granted other than to the plaintiffs personally. The Court then held that even though no class action could be brought the three plaintiffs are entitled to an adjudication of their personal claims of right to unsegregated use of public recreation facilities by declaratory judgment and a declaratory judgment to that effect was entered. The Court held however that no injunctive relief would be granted to the three plaintiffs personally in that under the facts the Judge deemed it unnecessary and not required by the individual needs of the plaintiffs.

The decision of the District Judge was affirmed by the Court of Appeals of the Fifth Circuit, the decision appearing 313 F.2d 637, the Court adopting the opinion of the District Court.[1]

Statement

The finding of the Trial Judge that none of the plaintiffs had themselves been denied any right, privilege or immunity claimed by them or denied any right to use any public recreational facility in the City of Jackson was not only amply supported by the evidence but was undisputed and was based upon the testimony of the plaintiffs themselves. The same is true with reference to the finding of fact that the plaintiffs themselves had been neither arrested or threatened with arrest under any statute nor the victims of any alleged discriminatory practice of the City.

Petitioners here do not allege otherwise but do not frankly state to the Court that these were the facts in this case. They state that "Negroes" had been refused the use of recreational facilities in the City of Jackson, but at no time state that plaintiffs had been refused the right of use of any recreational facilities and do not state to the

[1] On appeal to the Court of Appeals there was no assignment of error for the dissolving of the three-judge court and Petitioners have not and are not now complaining thereof.

Court that they admitted in the trial court that they had not been so refused the use of any facility.

We refer the Court to the record: Petitioner Clark admitted that he had never been arrested or threatened with arrest under any of the statutes complained of and that he had never tried to use any of the facilities involved and had never been prevented by the defendants from using any City facilities. (R. 220-244) Mary A. Cox testified to the same effect. (R. 251-277) W.R. Wren testified to the same effect. (R. 283-310)

Nor does the record reflect that any other Negroes were refused use of such facilities except in the case of a violation of the Breach of the Peace Statutes of the State and there had been no arrests save under the Breach of the Peace Statutes. The only evidence relied on by Petitioners to establish any discrimination against any one was that: (1) nine students, acting in concert to provoke an incident, were arrested at the public library on March 27th, 1961; (2) a group of two persons were arrested at the Municipal Zoo on June 6th, 1961, and (3) a group of four persons were arrested near a park swimming pool on July 5th, 1961. These other Negroes so arrested frankly admitted that they were arrested for a violation of the Breach of the Peace Statutes and that charges against them were still pending in the State courts. (R. 42-209, 97-201, 112-114, 122)

The testimony of the arresting officers in each of these three incidents was that they had grounds and reasons to and did believe that trouble was imminent unless the cause of the trouble was removed. (T. 52-3, 56, 196-7 202, 205-7)

The District Court granted personal relief to the individual plaintiffs. After holding that "this is not a proper class action and no relief may be granted other than that to which the plaintiffs are personally entitled," the Court

specifically declared "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." The Court then retained jurisdiction over the action for any further orders or relief that might be necessary. (R. 330-339)

The Court in denying injunction relief to the plaintiffs exercised its discretion in holding that it was unnecessary and that the individual defendants were "all outstanding high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein . . . They will conform to the ruling of this Court without being coerced so to do by an injunction." And the Court further held that plaintiffs had not presented facts sufficient to show their individual needs required injunctive relief (206 F.Supp. 539).

Questions Presented

Petitioners have presented not one but two separate and distinct questions which the Court should separately consider and decide. These questions are stated in the Petition for Writ of Certiorari herein on page 2 thereof as follows:

> "(*1*) Whether Negro petitioners seeking the use of public facilities on a non-segregated basis pursuant to the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States *have the right to maintain a class action* for other Negroes similarly situated, *and* (*2*) whether petitioners are entitled to *injunctive relief* against state segregation statutes and against the state policy of enforced racial discrimination in public facilities?"[2]

This is in accord with the grounds of appeal from the District Court to the Fifth Circuit. Petitioners appealing

[2] The italics and numbers added by Respondents.

from the following and only the following parts of the final order:

> "(1) That this is not a proper class action and no relief may be granted other than that to which the plaintiffs are personally entitled.
>
> (3) That the *plaintiffs* are not now entitled to any injunctive relief . . ."[3]

Different law and different facts are applicable to these two issues raised in the Court below and raised here. We shall discuss them separately.

POINT I

This Is Not a Proper Class Action and the Courts Below Committed No Error in Refusing to Grant Any Other Relief Than That to Which the Plaintiffs Were Personally Entitled.

As stated, it was undisputed that none of the three Petitioners here, plaintiffs below, were ever arrested or even threatened with arrest under any of the statutes complained of and moreover, that they had never attempted in any way to use the public facilities involved nor had they ever been refused at any time any right to use any public facilities. Therefore, if other Negroes in the City of Jackson were discriminated against by the City Officials either by enforcement of any statutes or by any discriminatory practice or policy, then plaintiffs are not a member of the class so discriminated against. A plaintiff or group of plaintiffs cannot bring a class suit unless they are a member of the class discriminated against by having been themselves discriminated against, i.e. one of those discriminated against.

[3] Petition for Writ of Certiorari, page 6.

Prior to citation of authorities relied on to support the above statement, we first point out the Petitioners have not cited a single authority justifying a class suit where the plaintiffs themselves had not been personally discriminated against.

Board of Trustees of the University of North Carolina v. *Fraiser*, 350 U.S. 979, 100 L.Ed. 848, affirming per curiam *Fraiser* v. *Board of Trustees*, 134 F.Supp. 589, referred to in the request for this Reply, was a clear case of a suit by persons who had themselves been discriminated against and who, therefore, could bring a class action. The alleged discrimination against the Negroes was that they were not allowed to attend the undergraduate school of the University of North Carolina. In the Opinion in the lower Court it is stated: "The plaintiffs made formal application for admission to the undergraduate school of the University on April 19th, 1955, and accompanied their application with a record of their academic achievements, character and personal references as required by the rules of the University. On April 27th, 1955, they received identical letters from the Director of Admissions in which they were told that the Trustees of the University had not changed the policy of admission of Negroes who were eligible to make application for graduate and professional studies not offered at a Negro college in the state, but were not eligible at that time to apply for admission to the undergraduate school. Thereupon the plaintiffs requested the University to reverse its policy of discrimination against Negroes and the Board of Trustees in reply, on May 23rd, 1955, reaffirmed its policy by passing the following resolution . . ." said resolution denying them the right to enter the undergraduate school. The Court did no more than hold that plaintiffs who were Negro youths who had been denied admission to the undergraduate school of the University and

thus personally denied their rights under the Fourteenth Amendment could bring a class action.

This is true, as each of the cases relied on by Petitioners to attempt to justify a class action:

For example, in *Kansas City* v. *Williams*, 205 F.2d 47, affirming 104 F.Supp. 857: "On June 20th, 1951, plaintiffs, Negroes, of full age, good character and sound health, went to the Swope Park swimming pool during the hours when said pool was open and being used and enjoyed by white persons, tendered their admission tickets entitling them to enter said pool, and sought to gain admission to the pool to swim. They were denied admittance to such pool for swimming by employees of the defendant City, in charge of the operation thereof solely on account of their race and color."[4] The Court thus held that it was a proper class action but carefully pointed out: "It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply 'because someone else may be hurt' . . . But *where he is able to establish his right to individual relief on this basis*, he may also under certain conditions, ask that the benefit of that adjudication be extended to others, where they constitute a class . . . where they are so numerous as to make it impracticable to bring them all before the court . . ."[5]

For example in *Holmes* v. *City of Atlanta*, 124 F.Supp. 290, affirmed 223 F.2d 93, reversed 350 U.S. 879, 100 L.Ed. 776: "Plaintiffs, who at all times met all lawful requirements necessary for admission to play golf, on July 19, 1951 requested defendants to grant them permission to play golf on the Bobby Jones Golf Course . . . whereupon plaintiffs were denied permission to and the right to play golf"

[4] Quotation from opinion in 104 F.Supp. 857

[5] Quotation from 205 F.2d 47.

as requested, such denial being upon the sole basis of the race and color of the plaintiffs."

Or for example, in *Potts* v. *Flax*, C.A. 5, 313 F.2d 284, affirming 204 F.Supp. 458, the suit was brought by six Negro school children of Herbert Teal and one Negro child of Flax by their respective parents as next friend, the Court pointing out: "... The children named in the complaint were refused enrollment at the school nearest their respective homes solely on the ground of their race and color."[7] The decree granting class relief was not challenged on the ground that plaintiffs were not members of the class. It was merely challenged on the ground that "Such matters are not ... determined on a class basis since the Board must register each child one at a time as individuals."[8] Class decree was thus challenged on the basis of "... the right to bring a class action by reason of the intrinsic nature of the rights involved ..." as in school cases. The Court merely held: "The *pleaded* reason for challenging the class suit was, therefore, unfounded." The issue here was not presented there and could not be presented because the plaintiffs were members of the class.

Each and every other case relied on by Petitioners as sustaining a class action can be similarly distinguished, i.e. in each and every case the plaintiffs themselves were members of the class. Here they were not.

The decision of the Courts below denying any class relief on the ground that plaintiffs, Petitioners here, had not been personally discriminated against and were not members of the class for which relief was sought, is in strict

[6] Class relief granted in the lower courts was only for equal use of existing facilities; it served to preclude the right to use any public facility.

[7] Quoting 204 F.Supp. at 460.

[8] 313 F.2d at 288.

accord with decisions of this Court and of every other Court of Appeals where the same situation existed.

To reverse this case on the ground that no class relief was granted would necessitate the specific overruling of *McCabe v. Atchison, etc.*, 59 L.Ed. 169; 235 U.S. 151, where action was brought by a few Negroes for a sweeping injunction against railroad carriers preventing them generally from complying in any way with the state separate coach law. The complaint alleged that the defendants were: "... making distinctions in the civil rights of your orators and of all other persons of the Negro race and persons of the white race in the conduct and operation of its trains ..." Complainant alleged that its purpose was to avoid a multiplicity of suits "... there being at least fifty thousand persons of the negro race in the state of Oklahoma who will be injured and deprived of their civil rights." The lower court dismissed the bill. The Supreme Court in affirming the lower court's decree stated:

> "... The complainant cannot succeed because some one else may be hurt. *Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant, not to others, which justifies judicial intervention.* Williams v. Hagood, 98 U.S. 72, 74, 75, 25 L. ed. 51, 52; Marye v. Parsons, 114 U.S. 325, 328, 329, 29 L. ed. 205, 206, 5 Sup. Ct. Rep. 932, 962; Tyler v. Registration Ct. Judges, 179 U.S. 405, 406, 45 L. ed. 252, 253, 21 Sup. Ct. Rep. 206; Tarpin v. Denon, 187 U.S. 51, 60, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Davis & F. Mfg. Co. v. Los Angeles, 189 U.S. 207, 220, 47 L. ed. 778, 781, 23 Sup. Ct. Rep. 498; Hooker v. Burr, 194 U.S. 415, 419, 48 L. ed. 1046, 1050, 24 Sup. Ct. Rep. 706; Brax-

tee County Ct. v. West Virginia, 208 U.S. 192, 197, 52 L. ed. 450, 451, 28 Sup. Ct. Rep. 275; Collins v. Texas, 223 U.S. 288, 295, 296, 56 L. ed. 439, 443, 444, 32 Sup. Ct. Rep. 286.

> "... It is not alleged that any one of the complainants has ever traveled on any one of the five railroads, or has ever requested transportation on any of them; or that any one of the complainants has ever requested that accommodations be furnished to him in any sleeping cars, dining cars, or chair cars; or that any of these five companies has ever notified any one of these complainants that such accommodations would not be furnished to him, when furnished to others upon reasonable request and payment of the customary charge. Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, he will not have an adequate remedy at law. *The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule, that the complainant must present facts sufficient to show that his individual need requires the relief for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed.*" (emphasis ours)

The latest expression of this Court is in *Bailey v. Patterson*, 368 U.S. 346, 7 L.Ed.2d 332, and *Bailey v. Patterson*, 369 U.S. 31, 7 L.Ed.2d 512. In the first opinion on a motion

for an injunction pendente lite to stay the prosecution of a number of criminal cases in Mississippi courts the Court denied the same on the primary ground that there was no justification for the extraordinary remedy and two concurring judges also pointed out that "... the three movants are not themselves being prosecuted or threatened with prosecution in Mississippi ..." In the second decision in overruling the decision of the three-judge court that the case should be delayed pending a state construction of the statutes involved the Court held that the appellants lacked "standing" to enjoin criminal prosecution under Mississippi Breach of the Peace Statutes in that "They cannot represent a class of whom they are not a part." The Court then merely held that they had standing to enforce their personal rights as passengers and remanded the cause to the District Court for disposition "of the appellants' 'claims of right to unsegregated transportation service'", i.e. their personal claim of right to unsegregated service.

Note the difference between the order in the *Bailey* case and the order in the case of *Turner v. Memphis*, 7 L.Ed.2d 762, 369 U.S. 350, where the plaintiff was "a Negro who was refused non-segregated service in the Memphis Municipal Airport restaurant" who brought the action for himself and other Negroes similarly situated. There where the plaintiff was a member of the class, the order of this Court read "... the case is remanded to the District Court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained of."

Other Federal Court decisions holding that a party cannot obtain injunctive relief on behalf of a class where he is not a member of the class and has not been personally discriminated against or deprived of the rights sought to be remedied in the litigation on behalf of the class include:

Dauley v. City of Norfolk, Virginia, C.A. 4, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.Ed.2d 636, 359 U.S. 935;

Braxton v. Board of Trustees of La Grange Ind. Sch. Dist., C.A. 5, 187 F.2d 20;

Kansas City v. Williams, C.A. 8, 205 F.2d 47 (rule stated);

Hackett v. Illinois Central Railroad, C.A. 7, 278 F.2d 529;

Rock Drilling, Blasting, etc. v. Mason & Hanger Co., C.A. 2, 217 F.2d 687;

Carroll v. Associated Musicians of Greater New York, C.A. 2, 316 F.2d 574;

Johnson v. Craven, 128 F.Supp. 230;

Anderson v. Kelly, 32 F.R.D. 355;

Conley v. Gibson, 29 F.R.D. 519.

A reversal of this case would be in conflict with all of the above authorities and would not be justified by or supported by any Federal case.

There is no hardship in the rule so limiting class suits, the limitation being bedded in equitable principles and class suits being a creature of equity. Here Petitioners not only were not members of the purported class allegedly discriminated against but each admitted that they had filed the suit entirely on their own initiative and had talked to no one about the litigation except the other plaintiffs and did not know to what extent other members of the purported class agreed or *disagreed* with them. They were pure volunteers. Nor is there any hardship on persons discriminated against on account of this rule, i.e. it would not require individual suits in each instance. A class suit could be brought by one individual discriminated against by being personally denied rights under the Fourteenth Amendment.

Point II

Petitioners Personal Rights to Non-Discriminatory Use of the Recreational Facilities of the City of Jackson Were Fully Protected by the Judgment of the Court Below.

The court below not only found as a fact but specifically ordered "that each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." At the same time the court retained jurisdiction of the entry of such further orders and relief as might be subsequently appropriate. This order was entered on May 16, 1962. No requests have been made of the court for any further orders or relief.

Petitioners were told by the District Court not to be entitled to injunctive relief on four different grounds: (1) An injunction should only be granted with great caution, care and deliberation and the power to issue injunctions should not be lightly indulged in but exercised sparingly and only where relief is necessary to prevent great and irreparable injury; which conditions did not exist; (2) An injunction should not issue where plaintiffs do not present facts sufficient to show that their *individual needs require* injunctive relief; which did not exist; (3) It is the policy of the Federal courts to refuse to interfere with or embarrass threatened prosecution in state courts except in exceptional cases to prevent irreparable injury which is clear and imminent; not present here; (4) Granting of an injunction is within the sound discretion of the trial judge and he was exercising this discretion in refusing this extraordinary remedy because of the high character of the defendants and his firm belief that they would conform to the ruling of the court without being coerced to do so by injunction and belief that the court should place trust

in the Respondents to obey the mandate of the court without an injunction hanging over their heads."

The discretion exercised by the trial judge here in denying injunctive relief is reviewable only for abuse of discretion and for the reasons given there was no abuse of discretion particularly where the injunction sought to control State officers in the conduct of their office and to control by injunction the general conduct of a political subdivision.[10] *Brotherhood* v. *Missouri-Kansas-T. R. Co.*, 4 L.Ed. 2d 1379, 363 U.S. 528; *Pear* v. *Cox*, C.A. 5, 190 F.2d 123 cert. den. 96 L.ed. 671; *Barnes* v. *City of Gadsden*, C.A. 5, 174 F.Supp. 64, affirmed 268 F.2d 566, cert. den. 4 L.ed.2d 186; *Beales* v. *Huff*, C.A. 9, 144 F.2d 428; *Hecht Company* v. *Bowles*, 321 U.S. 321, 88 L.ed. 754; *Reliable Transfer* v. *Blanchard*, C.A. 5, 145 F.2d 551; *Spitalain Motor Sales* v. *Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45, 85 L.ed. 577; *Sterling* v. *Constantin*, 287 U.S. 378, 77 L.ed. 375; *Daniels* v. *City of Norfolk*, C.A. 4, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed. 2d 636.

There is no question of a reversal of exercise of discretion of the trial judge in denying an injunction in the case of *Board of Trustees* v. *Fraser*, 100 L.ed. 848, 350 U.S. 979, affirming *Fraser* v. *Board of Trustees*, 134 F.Supp. 589. There the trial judge exercised his discretion to *allow* the injunctive relief.

Moreover, not only can a class suit not be brought unless the plaintiffs themselves were members of the class and had been actually discriminated against or themselves deprived of constitutional rights but the plaintiff cannot even for himself without seeking a class suit, obtain

[10] 204 F.Supp. 30.

[10] Criticized in *Brown* v. *Board*, C.A. 5, 187 F.2d 20.

injunctive relief where plaintiff himself had not been deprived of constitutional rights. *Pidcoke* v. *Ullman*, 318 U.S. 44, 87 L.ed. 603; *Poe* v. *Ullman*, 367 U.S. 497, 6 L.ed.2d 989;[11] *Toomer* v. *Witsell*, 334 U.S. 385, 92 L.ed. 1460, rehearing denied 93 L.ed. 389; *Briggs* v. *Ramsey*, C.A. 8, 185 F.2d 225. The rights under the Fourteenth Amendment are individual or personal rights and an individual is not entitled to injunctive relief, under the above authorities, merely because someone else has been deprived of rights under the Fourteenth Amendment, i.e. cannot vindicate the constitutional rights of some third party. See *Joint Anti-Fascist Refugee Com.* v. *McGrath*, concurring opinion, in 341 U.S. 123, 95 L.ed. 817. An individual cannot challenge the constitutionality of a statute unless he can show that his own constitutional rights are infringed. *Rode* v. *Barrett*, 344 U.S. 583, 97 L.ed. 567; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U.S. 571, 59 L.ed. 364; *New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 51 L.ed. 415; *Erie R. Co.* v. *Williams*, 233 U.S. 68, 58 L.ed. 1155.

This question also, of course, was not involved in *Board of Trustees* v. *Fraiser*, 350 U.S. 979, 100 L.ed. 848, affirming 134 F.Supp. 589, because, as stated, plaintiffs there had been personally discriminated against and their individual constitutional rights had been violated; not true here.

Petitioners do not attempt to evade the applicability of the above rule insofar as any injunctive relief to the individual petitioners is concerned against the acts of state officers in generally enforcing racial segregation in public facilities or any general state policy of enforcing such racial discrimination. Instead Petitioners merely fall back on the very limited exception to the rule denying injunctive relief against the enforcement of state criminal statutes

[11] See concurring opinion of Frankfurter, Warren, Clark and Whittaker at page 997.

to the effect that a plaintiff does not need, under some limited circumstances, wait to be actually arrested under criminal statutes to obtain injunctive relief.

However, this exception to the rule is limited to instances where a party's acts clearly come within the terms of the criminal statute and the enforcement thereof against him is threatened and he is in clear and imminent danger of immediate arrest and the penalty of the statute is so severe that he should not be required to obtain relief to incur this grave imminent danger.

Cases so limiting this exception and *refusing to apply it include: Poe v. Ullman*, 6 L.ed.2d 512, 367 U.S. 497; *Baileu v. Patterson*, 7 L.ed.2d 332, 512, 368 U.S. 346, 369 U.S. 31; *American Federation of Labor v. Watson*, 80 L.ed. 873, 327 U.S. 582; *Spielman Motor Sales Co. v. Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Stefanelli v. Minard*, 86 L.ed. 138, 342 U.S. 117; *Bradford v. Hart*, C.A. 5, 284 F.2d 722; *Empire Pickwick Distributing Co. v. City of Fort Worth*, C.A. 5, 273 F.2d 529.

Here not only were Petitioners never arrested or threatened with any arrest and were not ever in danger of any arrest under the criminal statutes here complained but also *no persons* were ever arrested under the statutes complained of and they had never been enforced against anyone. Nor had their enforcement ever been suggested, threatened or imminent. The only arrests of any persons were under the Mississippi Breach of the Peace Statutes, not under attack here.

Under no circumstances will a Federal court enjoin the enforcement of Breach of the Peace Statutes where there would be diverse issues and different questions of fact in each such enforcement and where a Federal court could not determine in advance under what circumstances and conditions enforcement of the Breach of the Peace Statutes

would be deemed to deny constitutional rights. *Douglas* v. *Jeanette*, 319 U.S. 157, 87 L.ed. 1324. The right of officials of a state to prevent breaches of the peace cannot be denied. *Thornhill* v. *Alabama*, 84 L.ed. 1093, 310 U.S. at 105. See *United Electrical Workers* v. *Baldwin*, 67 F.Supp. 235.

Petitioners rely only on *NAACP* v. *Button*, 371 U.S. 415, 9 L.ed.2d 405.[12] This is merely a clear case of the exception to the rule against enjoining enforcement of state criminal statutes. Not only were the acts of the NAACP clearly within the terms of the criminal statute involved but they were violating and intended to continue a violation thereof, and the threat and danger of immediate arrest thereunder was clear and imminent, i.e. the danger was so clear and grave that it would have prevented the exercise of constitutional rights even without enforcement because the NAACP could not afford to test its constitutional rights by the incurring of such grave criminal liability.

No such facts exist here. In the lower court these Petitioners frankly conceded that none of the three statutes complained of had ever been enforced and that they sought injunctive relief against the City officials only from enforcing a pattern of racial discrimination. That court specifically found that: "Moreover, viewed most favorably to the plaintiffs, the evidence does not indicate that the discriminatory denial of the use of these public facilities has been on the basis of any one or more or all of such statutes."[13]

As a matter of fact here none of the Petitioners' acts did or *could* come within the terms of the three statutes

[12] Companion case is *NAACP* v. *Patty*, 159 F.Supp. 503, vacated on other grounds, 360 U.S. 167.

[13] 204 F.Supp. 31.

complained of. *Section 1065.5* [14] is applicable only to executive officers of the state, not Petitioners.[15] *Section 2046.5* [14] is only applicable to private persons engaged in a business, trade or profession in Mississippi where the business is open to the general public and no acts of Petitioners did or *could* come within the terms of that statute.[15] Section 2056(7) [14] merely makes it a crime for two or more persons to conspire "to overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise *et. al.*". This necessarily limits the crime to conspiracy to overthrow such laws through some unlawful means or criminal acts under the doctrine of ejusdem generis. *Gallia* v. *Stewart*, Miss., 174 So. 559; *State* v. *Russell*, Miss., 187 So. 540.

Thus Petitioners here cannot enjoin the enforcement of these criminal statutes against them. Petitioners cite no authority justifying the enjoining of the City officials from enforcing any policy of racial segregation in public facilities against Petitioners, who have never themselves been discriminated against. We therefore submit that Petitioners have shown no right to have this Court reverse the Court in denying Petitioners individual injunctive relief, Petitioners rights of non-discriminatory use of public facilities never having been questioned or threatened.

Conclusion

In direct response to the request of the Court for a discussion of *Board of Trustees of the University of North Carolina* v. *Fraser*, 350 U.S. 979, 100 L.Ed. 848, affirming per curiam *Fraser* v. *Board of Trustees*, 134 F.Supp. 589,

[14] See Appendix D of Petition for Writ of Certiorari here.

[15] Not a criminal statute.

we again submit that this decision is totally inapplicable here and point out:

(1) That case held that a three-judge court was proper. Here a three-judge court was convened and dissolved and Petitioners did not below or do not now complain thereof or assign the dissolution of the three-judge court as error.

(2) That case was a proper instance of a class action the plaintiffs being Negro youths who had made formal application for admission to the undergraduate school of the University, showing their qualifications to attend such school, and who on being denied admission, requested a reconsideration thereof and who were actually refused admission to the school.

(3) The defendants in that case had actually enforced against the plaintiffs a resolution of the Board of Trustees, made under its statutory rule making power, denying any Negro admission to the undergraduate school of the University, which regulation the Court held "must be considered a 'statute' ".

(4) This Court affirmed the discretion of the trial judge in granting injunctive relief and was not asked to reverse the exercise of discretion by the trial judge.

(5) Injunctive relief was limited to an injunction against excluding Negroes "as a class" on the sole basis of race, and specifically reserved the right of the University to determine individual rights to attendance in the undergraduate school, i.e. it limited the injunction against the defendants to forbidding it to discriminate solely and only on account of race or against Negroes as a group reserving to the University the right to determine whether a particular Negro was eligible and did not require the admission of all Negroes as such regardless of any other ques-

tion. Here Petitioners argue against any reservation of the right in Respondents to determine when any acts of Negroes attempting to use public facilities constitute a breach of the peace.

We therefore respectfully submit that the Petition for a Writ of Certiorari should be denied.

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